No. 430. 145.

FILED.
OCT 18 1897
JAMES H. McKENNEY,
CLERK.

Brief of Opp Starbell for D E. (mo

(16643.)

Filed Oct 18, 1897.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1897.

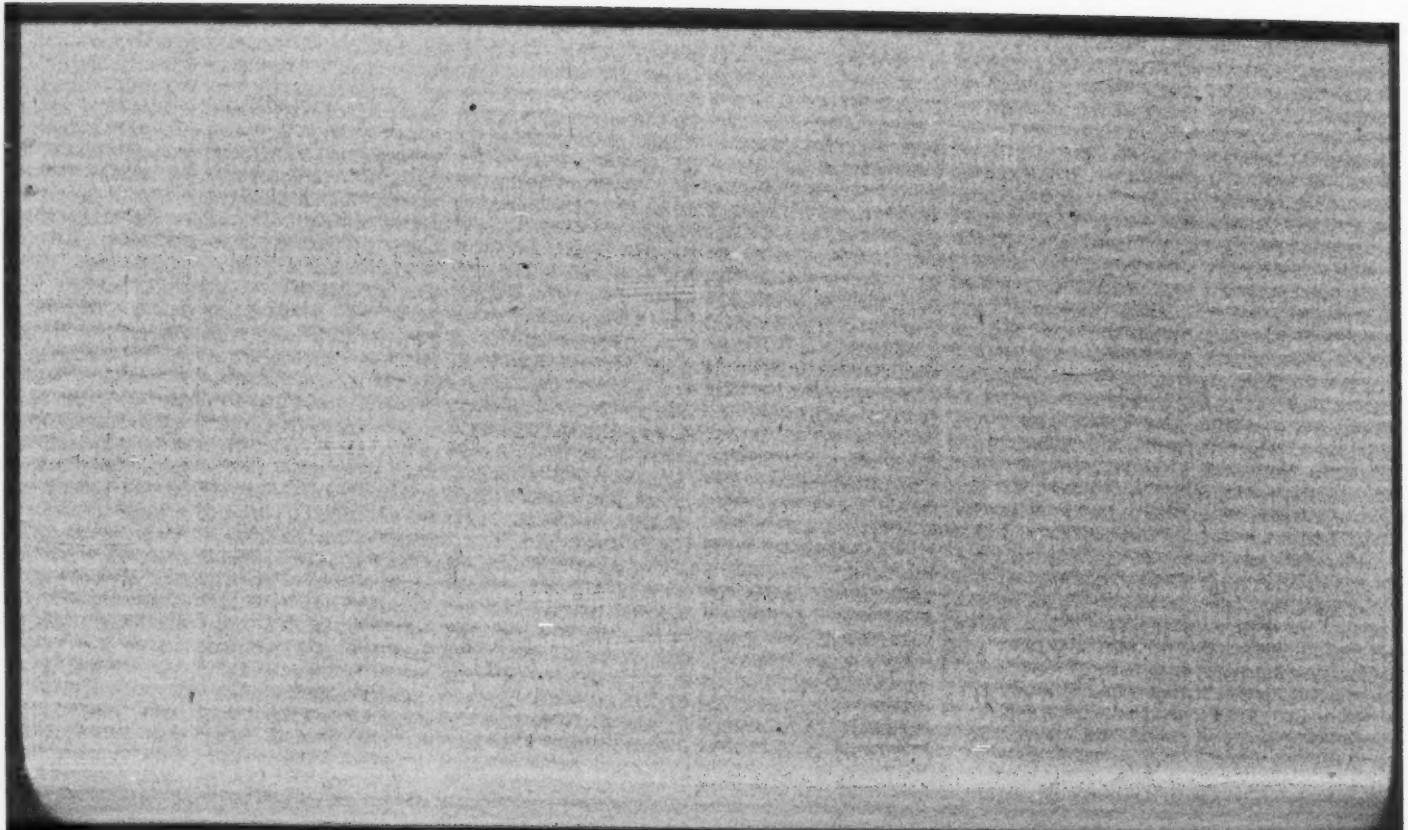
No. 430.

THE CENTRAL LOAN & TRUST COMPANY,
Plaintiff in Error and Appellants,
AGAINST
THE CAMPBELL COMMISSION COMPANY,
Defendant in Error and Appellee.

In Error to and Appeal from the Supreme Court of the Territory of Oklahoma.

MOTION TO DISMISS.

STATE CAPITAL PRINTING CO., GUTHRIE, OK.



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No. 430.

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MOTION TO DISMISS.

Now comes the defendant in error and appellant, and moves the Court to dismiss this appeal and writ of error, for the following reasons:

This action was an action in the District Court of Noble County, Oklahoma Territory, to recover judgment against this defendant in error in the sum of sixteen thousand dollars ($16,000.00) with interest, on a promissory note before the same was due and an attachment

was attempted to be procured in pursuance to the provisions of the Code of Civil Procedure of Oklahoma Territory, authorizing suit in attachment proceedings on debts before due. A certain writ of attachment was issued in the cause (see page 11, printed record,) and subsequently an order of garnishment was issued to one A. H. Pierce (see record, p. 13). Subsequently A. H. Pierce filed his interplea in the case claiming the attached property (see record, p. 16). Subsequently the said A. H. Pierce filed his motion in the case to discharge the attachment (see record pp. 17 and 18). Subsequently the said A. H. Pierce answered in the case as garnishee (see record, p. 19). This answer of Pierce, as garnishee, disclosed the fact that T. A. Stoddard also claimed the garnished and attached property, and at the instance of the plaintiff in the case an order was made therein requiring the said Stoddard to interplead in said cause and to set up his interest in the garnished property (see record, p. 30). Subsequently the said T. A. Stoddard filed his interplea in the case, claiming to own the attached and garnished property (see record, p. 31). Subsequently the plaintiff filed a demurrer to the interplea of T. A. Stoddard (see record, p. 43), and thereafter one George W. Miller and J. C. Miller also filed an interplea in the case, claiming the attached property (see record, p. 44). Thereafter the plaintiff filed an answer to the interplea of A. H. Pierce (see record, p. 46,) and thereafter and on the 16th day of December, 1895, the defendant in error and appellee filed a plea to the jurisdiction of the Court in the cause (see record, p. 49,) and thereafter and on the 16th day of July, 1895,

the Court sustained the said plea to the jurisdiction in said cause and dismissed the case. That part of the order (see record, p. 51) reads as follows:

"It is further considered, ordered and adjudged that by reason of the nullity of the said attachment proceedings the attempted service by publication in this matter upon the defendant, The Campbell Commission Company, is null and void and of no effect, and that the Court has no jurisdiction to hear and determine this cause, to which the plaintiff duly excepted and excepts.

"It is therefore by the Court considered, ordered and adjudged that this action be and the same is hereby dismissed for want of jurisdiction," etc.

From this order of dismissal of the case for want of jurisdiction the plaintiff in error and appellant, as plaintiff in error, filed its petition in error in the Supreme Court of the Territory of Oklahoma, making the said Campbell Commission Company the sole defendant in error, and did not make the said A. H. Pierce, T. A. Stoddard, George W. Miller or J. C. Miller, or either of them, defendants in error in the Supreme Court of the Territory, and upon the affirmance of the said judgment of the District Court of Noble County in the Supreme Court of said Territory, the plaintiff in error, the Central Loan and Trust Company, appealed from the said decision of the Supreme Court of the Territory and also sued out a writ of error thereto, but in neither the appeal nor writ of error to this court are either or any of the said parties, to-wit: A. H. Pierce, T. A. Stoddard, J. C. Miller and George W. Miller made parties, and the sole defendant in error and appellee is the said defendant, the Campbell Commission Company. The appellee therefore, moves to dismiss this case for want of neces-

sary parties in this court to entitle the appellant and plaintiff in error to a review of the decision complained of.

ARGUMENT.

The proceeding in the trial court was essentially a proceeding *in rem*. The plaintiff had enforced the presence of all parties interested in the *res* on the record and the omitted parties were asserting ownership adverse to the plaintiff's attachment. The question of priority between Stoddard's transfer, of July first, and the plaintiff's seizure under its writ of attachment, of July second, is a narrow one in point of time alone.

The restoration of the status of this case, as a pending case in the court, and the restoration of the status of the plaintiff on a footing to contest the ownership of the property in the omitted parties in the court below, would be a judgment which would be vitally adverse to the interest of all these omitted parties. As the case stands, until The Campbell Commission Company should make a personal appearance in the case, it involved nothing except the ownership of the particular property and the right of the plaintiff as against the adverse claimants to subject it to the payment of its debt.

Black on Judgments, Sec. 836.

Freeman on Judgments, Sec. 567.

Penoyer vs. Neff, 95 U. S. 714.

Hart vs. Sansom, 110 U. S. 151.

Phillips vs. Thompson, 3 Stuart & Porter, 369.

Miller's interplea was authorized by paragraph 3918, Statutes of Oklahoma, 1893. Pierce's interplea was

authorized by the same statute, and by virtue of the garnishment process he also became a defendant in the case. (Par. 4088 and par. 4090, id.)

We insist, therefore, that the case comes fairly within the rule that where parties to the judgment in the Court below, whose interests will be substantially affected by a reversal, have been omitted in the Appellate Court, it has no jurisdiction to determine the case.

Ferguson vs. Smith, 10 Kan. 394.

Am. & Eng. Ency. of Law, Vol. 2, p. 192, and authorities cited.

Respectfully submitted.

Henry E. Asp.
John M. Shartel

Attorneys for Defendant in Error and Appellee.

The plaintiff in error and appellant will take notice that the above and foregoing motion to dismiss will be submitted to the Supreme Court of the United States on Monday, the 18th day of October, 1897, upon the opening of Court, or as soon thereafter as counsel can be heard.

Henry E. Asp.
John M. Shartel

Attorneys for Defendant in Error and Appellee.

Due service of the foregoing motion and brief is hereby acknowledged this _____ day of September, A. D., 1897.

Attorneys for Plaintiff in Error and Appellant.